

A Ilham Saputra bin Zainal Abidin v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
K-05-173-07 OF 2012
APANDI ALI, ZAWAWI SALLEH AND HAMID SULTAN JJCA
23 SEPTEMBER 2013

C *Evidence — Adverse inference — Failure of prosecution to call witness — Witness assisted chemist in analysing drug exhibits — Whether witness important and material — Whether evidence withheld or suppressed as witness offered to defence at end of prosecution's case — Whether chemist's evidence sufficient to identify drugs*

D The appellant was convicted and sentenced to death by the High Court for trafficking in 95.31g methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. He was arrested with the drugs on his person in a police operation. In his appeal against conviction and sentence, the appellant, inter alia, contended there was doubt as to the identity of the drugs because a person ('Sabri') who had assisted the chemist in analysing the drugs in question was not called to testify at the trial. As such, the appellant said, the trial court should have invoked adverse inference against the prosecution under s 114(g) of the Evidence Act 1950. It was argued that since the drugs were not analysed by the chemist exclusively, the chemist would not be in a position to testify as to the identity of the drugs.

F **Held**, dismissing the appeal and affirming the conviction and sentence:

- G** (1) Identification of the drugs was a question of fact. In this case, the chemist conducted the test and observed the result and concluded by identifying the type and nature of the drugs in question. The evidence showed Sabri had only assisted the chemist in conducting the GCMS analysis (see para 7).
- H** (2) The contention that adverse inference should have been invoked was out of place. There was no withholding or suppression of evidence of an important and material witness to the case. Sabri was not an important or material witness. His evidence was unnecessary to unfold the prosecution's narrative. Furthermore, Sabri was offered to the defence at the end of the prosecution's case (see para 11).
- I** (3) There was overwhelming evidence pointing to the appellant's guilt. There were three prior meetings between the appellant and the agent provocateur. They met after a series of calls and negotiations and finally both of them met at the agreed rendezvous for the final act of transacting

in the drugs. The appellant was caught with the drugs. There was no plausible reason for the appeal court to disturb the findings and decision of the High Court (see para 17).

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[Bahasa Malaysia summary]

Perayu disabitkan dan dijatuhkan dengan hukuman mati oleh Mahkamah Tinggi kerana mengedar 95.31g methamphetamine, kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Dia ditangkap dengan dadah tersebut yang berada dijagaannya semasa operasi polis. Dalam rayuannya terhadap sabitan dan hukuman, perayu, antara lain, berhujah bahawa terdapat kesangsian terhadap identiti dadah tersebut kerana seseorang ("Sabri") yang membantu ahli kimia dalam menganalisa dadah yang dipersoalkan tidak dipanggil untuk memberi keterangan semasa perbicaraan. Dengan itu, perayu menyatakan, mahkamah perbicaraan patut membangkitkan inferens bertentangan terhadap pihak pendakwaan di bawah s 114(g) Akta Keterangan 1950. Ia diujjahkan bahawa memandangkan dadah tidak dianalisa oleh ahli kimia secara eksklusif, ahli kimia bukan dalam kedudukan untuk memberi keterangan terhadap identiti dadah tersebut.

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Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

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- (1) Pengenalpastian dadah tersebut adalah persoalan fakta. Dalam kes ini, ahli kimia menjalankan ujian dan memerhatikan keputusan dan memutuskan dengan mengenal pasti jenis dan sifat dadah yang dipersoalkan. Keterangan menunjukkan Sabri hanya membantu ahli kimia dalam menjalankan analisa GCMS (lihat perenggan 7).
- (2) Hujahan bahawa inferens bertentangan patut dibangkitkan tidak boleh diterima. Tiada tindakan menyembunyikan atau menyekat terhadap keterangan penting dan saksi material kepada kes tersebut. Sabri bukan saksi yang penting atau material. Keterangan tidak perlu untuk membentangkan naratif pihak pendakwaan. Selanjutnya, Sabri ditawarkan kepada pihak pembelaan pada akhir kes pihak pendakwaan (lihat perenggan 11).
- (3) Terdapat keterangan yang kukuh yang mengarahkan kepada kesalahan perayu. Terdapat tiga perjumpaan terdahulu di antara perayu dan ejen perangkap. Mereka berjumpa selepas membuat beberapa panggilan telefon dan perundingan dan akhirnya kedua-dua berjumpa di tempat yang dipersetujui untuk tindakan terakhir membuat urusan dadah tersebut. Perayu ditangkap dengan dadah tersebut berada dalam kawalannya. Tidak terdapat alasan yang munasabah untuk mahkamah rayuan campur tangan dengan dapatan dan keputusan Mahkamah Tinggi (lihat perenggan 17).]

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A Notes

For cases on failure of prosecution to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 198–216.

Cases referred to

- B** (1) *Namasiyam* (2) *Rajindran* (3) *Goh Chin Peng*, and (4) *Ng Ah Kiat v PP* [1987] 2 MLJ 336, SC (refd)
Hari Bahadur Ghale v PP [2011] 5 MLJ 785; [2012] 2 CLJ 1006, CA (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265; [1992] 1 LNS 318, SC (refd)
- C** *Munusamy v PP* [1987] 1 MLJ 492, SC (refd)
Pie bin Chin v PP [1985] 1 MLJ 234 (folld)
PP v Datuk Haji Harun bin Hj Idris (No 2) [1977] 1 MLJ 15 (folld)
PP v Lam San [1991] 3 MLJ 426, SC (refd)
- D** *PP v Mohamed Halipah* [1982] 1 MLJ 155 (refd)
PP v Neoh Wan Kee [1985] 1 MLJ 368 (refd)
PP v Padi bin Abdullah [1989] 2 MLJ 60, HC (refd)
Tee Thian See v PP [1996] 3 MLJ 209, HC (refd)
Wan Mohd Azman bin Hassan @ Wan Ali v PP [2010] 4 MLJ 141, FC (refd)

E**Legislation referred to**

Dangerous Drugs Act 1952 ss 39B(1)(a), 40A
Evidence Act 1950 s 114(g)

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Appeal from: Criminal Trial No 45A-33 of 2010 (High Court, Alor Star)

Nurul Nadia bt Norizan (Gooi & Azura) for the appellant.
Samihah Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

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Apandi Ali JCA (delivering judgment of the court):

INTRODUCTION

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[1] The appellant was convicted and sentenced to death for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 by the High Court in Alor Star. The charge against the appellant at the High Court reads as follows:

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Bahawa kamu pada 9 Ogos 2007, jam lebih kurang 5.30 petang di tepi pagar kilang Hamagawa Sdn Bhd, Jalan Bakar Arang, Sungai Petani, dalam Daerah Kuala Muda, dalam Negeri Kedah Darul Aman, telah didapati mengedar dadah berbahaya iaitu methamphetamine berat 95.31g. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The appellant appealed against his conviction and sentence. On appeal this court dismissed his appeal and affirmed the conviction and sentence imposed by the High Court. We shall now give our reasons.

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FACTUAL MATRIX OF CASE

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[3] The facts of the case are well set out in the judgment of the High Court and we do not propose to repeat them herein. Nevertheless, the salient facts are as follows: the appellant was arrested as a result of a sting operation conducted by the police. The operation took a few days to materialise as an agent provocateur, in the person of SP4, D/Cpl Zaini bt Derani, having to make calls and conduct meetings with the appellant. Their first meeting took place on 2 August 2007 and subsequent to that there were several telephone conversations indicating the willingness of the appellant to supply the drugs and the agreed price. It was agreed that for the supply of 100g of *syabu* the purchase price was RM25,000. Later after a few more calls, on 9 August 2007, the rendezvous for the transaction of the drugs was agreed. At the said agreed time and place, the appellant and SP4 met and after ensuring that the drugs were in the possession of the appellant, SP4 gave the pre-arranged signal to the awaiting police ambush party. The appellant tried to escape but was apprehended and arrested by the police.

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THE APPELLANT'S CONTENTIONS

[4] Learned counsel for the appellant canvassed on three issues:

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- (a) the identity of the drugs;
- (b) adverse inference for the prosecution's failure to call one Sabri, who assisted the chemist in the analysis of the drugs; and
- (c) contradictions in the narrations by the prosecution witnesses, namely that of SP4 (D/Cpl Zaini bt Derani), SP7 (C/Insp Muhammad Amin bin Mat Yasin) and SP8 (ASP Che Man bin Che Amat).

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[5] On the issue of the identity of the drugs, the crux of the submission is based on the fact that the chemist (PW2) was assisted by one Sabri. It was argued by counsel that since the drugs were not analysed by the chemist, the chemist will not be in a position to identify the drugs. In support for her contention, learned counsel relied on the authority of *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1992] 1 LNS 318.

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[6] Upon perusal and analysis of the evidence of the chemist (PW2), we found that the so-named Sabri only assisted the chemist in conducting the

- A GCMS analysis. The material part of the evidence can be seen in the cross-examination of SP2 (at p 12 of the appeal records) which reads as follows:

PEMERIKSAAN BALAS

- B Q: Ada pembantu bantu kamu melakukan ujian ini?
A: Ada pembantu
Q: Berapa orang pembantu?
A: 2 orang
- C Q: Siapa nama mereka?
A: Encik Sabri bin Tajudin iaitu Penolong Pegawai Sains dan Umi Hanani binti Wahab seorang Pembantu Makmal Kanan
Q: Jelaskan apakah tugas yang dilakukan oleh kedua-dua pembantu kamu untuk ujian ini?
- D A: Puan Umi Hanani bantu saya dalam menyediakan peralatan seperti mesin pengisar, radas kaca dan bahan kimia untuk saya jalankan analisa. Manakala Encik Sabri membantu saya menjalankan analisis GCMS.

- E [7] It is trite law that identification of drugs is a question of fact, which like any other conclusion of fact, can either be by direct or circumstantial evidence. A chemist will be able to identify the drugs by conducting various tests and observing the result. In this case, the chemist conducted the test and observed the result and concluded by identifying the type and nature of the drugs. The chemist's evidence can be seen at p 8 of the appeal records, which reads as follows:

- G ... Saya telah mengisar kesemua bahan kristal jernih tersebut supaya menjadi serbuk yang homogen. Seterusnya saya telah mengambil sedikit sampel perwakilan secara rawak untuk menjalankan ujian warna iaitu ujian marquis. Ujian ini telah memberikan keputusan yang positif. Ini menunjukkan bahawa bahan tersebut berkemungkinan mengandungi methamphetamine.

- H Seterusnya saya mengambil sedikit lagi sampel perwakilan secara rawak untuk menjalankan ujian GCMS. Ujian ini juga telah memberikan keputusan yang positif. Ini mengesahkan bahawa bahan tersebut mengandungi methamphetamine.

- I Saya telah mengambil 21 sampel perwakilan secara rawak untuk menjalankan ujian GC bagi menentukan peratus kandungan methamphetamine dalam bahan tersebut.

- Ujian ini juga sekali lagi mengesahkan bahawa bahan tersebut mengandungi methamphetamine. Dari ujian ini saya dapati bahan tersebut mengandungi 71.3944% methamphetamine.

Setelah dikira peratusan tersebut berdasarkan berat bersih bahan yang saya terima iaitu 133.50g, saya dapati bahan tersebut mengandungi 95.31g methamphetamine.

[8] Based on the evidence above, we find that there is no merit on the issue of identity of the drugs. A

[9] Our finding on this issue is based on the Supreme Court case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 which, inter alia, held as follows: B

... in this type of cases where the opinion of the Chemist is confined only to the elementary nature and identity of the substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the Chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step. C

[10] A similar reasoning was later echoed in another Supreme Court case of *Public Prosecutor v Lam San* [1991] 3 MLJ 426, which held that: D

In the regard to the evidence of the chemist, unless the evidence is so inherently incredible that no reasonable person can believe, it to be true, it should be accepted as prima facie evidence. As long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory. The evidence of the chemist in this case was more than sufficient as basis to call for the defence, granted that all the other ingredients of the offence has been successfully proved. E

[11] On the second ground of adverse inference for not calling the assistant of the chemist, we are of the view that such contention is out of place. Adverse inference under illustration (g) of s 114 of the Evidence Act 1950 reads: that evidence which could be and is not produced would if produced be unfavourable to the person who *withholds* it. Such inference can be drawn if there is withholding or suppression of evidence. It may be drawn from withholding not just any witness but only an important and material witness to the case. F G

[12] From the examination of the evidence, we find that the assistant to the chemist, by the name of Sabri is not an important or material witness. His evidence is unnecessary to unfold the narrative of the prosecution's case. Furthermore there is no evidence of suppression of evidence and the said Sabri was offered to the defence, at the end of the prosecution's case (see DPP's submission at p 233 of the appeal records). H

[13] For the above reason, we find that there is no merit on the said issue canvassed by learned counsel for the appellant. On the last issue of contradictions between of the prosecution witnesses, we find, upon perusal of the evidence adduced at the trial, that there were no material contradictions that can give rise to conflicting versions of the substantive case for the I

- A prosecution. The trial judge, having the advantage of audio visual appreciations of the witnesses had made findings of facts based on the evidence of the prosecution witnesses. It is within the trial judge's domain to evaluate the evidence that were given, including of any contradictions, if any. On this issue, our findings are guided by the cases of *Public Prosecutor v Datuk Haji Harun bin Hj Idris (No 2)* [1977] 1 MLJ 15 and *Pie bin Chin v Public Prosecutor* [1985] 1 MLJ 234.
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CONCLUSION

- C [14] As indicated earlier this case involved an agent provocateur in a sting operation by the narcotics division of the police force. Under s 40A of the Dangerous Drugs Act 1952 an agent provocateur is presumed to be worthy of credit and that his evidence shall be admissible as evidence at trial and that his evidence need not be corroborated.
- D (see *Public Prosecutor v Neoh Wan Kee* [1985] 1 MLJ 368; (1) *Namasiyam* (2) *Rajindran* (3) *Goh Chin Peng*, and (4) *Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; *Public Prosecutor v Mohamed Halipah* [1982] 1 MLJ 155; *Public Prosecutor v Padi bin Abdullah* [1989] 2 MLJ 60; *Tee Thian See v Public Prosecutor* [1996] 3 MLJ 209; and *Hari Bahadur Ghale v Public Prosecutor* [2011] 5 MLJ 785; [2012] 2 CLJ 1006).
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- F [15] Notwithstanding the presumption of the credit worthiness of the agent provocateur (SP2) we had examined the defence carefully to find if that presumption has been rebutted. This is in line with the Federal Court decision in *Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* [2010] 4 MLJ 141. However we found none.
- G [16] Having examined the evidence before us, upon perusal of the grounds of judgment and upon hearing submission from both parties, we hold that:
- H (a) the High Court did not err in arriving at its findings, at the end of the prosecution's case, that the prosecution had established a prima facie case and in calling the appellant to enter his defence; and
- I (b) the defence has been properly and adequately considered by the trial judge, who correctly came to the conclusion that the appellant failed to cast any reasonable doubt on the prosecution's case.
- [17] It is our judgment that on the evidence adduced at the trial, there is overwhelming evidence that irresistibly point to the guilt of the appellant. To recapitulate: there were three prior meetings between the appellant and the agent provocateur (SP4). They met after a series of calls and negotiations. And

finally both of them met at the agreed rendezvous for the final act of transacting the drugs. The appellant was caught with the drugs that was the subject matter of the arranged transaction.

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[18] In that light, we find that there is no plausible reason for us to disturb the findings and decision of the High Court. We also conclude that the conviction of the appellant is obviously a safe one.

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[19] For the above reasons, we unanimously dismiss the appeal by the appellant. The conviction and sentence by the High Court is affirmed.

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Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar

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